

The Information Commissioner's response to the Financial Conduct Authority's call for input on open finance

The Information Commissioner's Office (ICO) has responsibility for promoting and enforcing the General Data Protection Regulation (GDPR), the Data Protection Act 2018 (DPA18), the Freedom of Information Act 2000, the Environmental Information Regulations 2004 and the Privacy and Electronic Communications Regulations 2003 (PECR), amongst others. We are independent from government and uphold information rights in the public interest, promoting openness by public bodies and data privacy for individuals. We do this by providing guidance to individuals and organisations, and taking appropriate action where the law is broken.

The ICO welcomes the opportunity to respond to this call for input. We have positive, ongoing engagement with the implementation of open banking, providing advice on the interactions between the GDPR and the revised Payment Services Directive (PSD2) and collaborating on the content of customer journey guidance for third-party providers.

We have also supported Ofcom with its initial proposal for open communications, drawing on the lessons learnt from open banking to assist in identifying key data protection issues from the outset of the project.

The Information Commissioner recognises that innovations in finance are becoming increasingly data-driven, and she is broadly supportive of any initiative within the financial sector which gives individuals more control over their personal data.

Q2: We are interested in your views on what open banking teaches us about the potential development of open finance

Open banking as a concept was created in response to the Retail Banking Market Investigation Order 2017, implemented by the Competition and Markets Authority (CMA) to address issues with competition in the personal current account and small- and medium-sized enterprise banking markets.

The Open Banking Implementation Entity (OBIE) is tasked with fulfilling this Order, including the delivery of the Application Programming

Interfaces (APIs), creation of the Customer Experience Guidelines and principles for participating firms.

The OBIE views the GDPR as being central to the implementation of the open banking protocols, inviting the ICO to be a member of the OBIE Steering Group and attend meetings and workshops. This close, regular engagement allows us to provide expertise in a timely and effective manner across a broad range of matters including transparency, fairness, and customer experience.

We would encourage a similar approach in the development of open finance. Structured cooperation has enabled us to keep apprised of advancements and concerns at an early stage, which has helped the OBIE address data protection risks in an efficient and effective manner, and has helped us learn more about the practical challenges of innovating in the financial services sector. If businesses within the ecosystem require advice about privacy and data protection, our experience is that it is beneficial to give this input at the earliest available opportunity to embed it into the innovation process – known in the GDPR as a ‘data protection by design and default’.

Q4: Do you agree with our assessment of the potential benefits of open finance? Are there others?

We agree with your assessment of the potential benefits of open finance. In addition, open finance is potentially an excellent opportunity for raising awareness of data protection and how personal data is processed, both for both the consumer and the businesses involved.

Making people aware of what is happening to their data, who is processing it and why empowers the consumer to become ‘data aware’ and make good decisions.

Ensuring that individuals’ rights are built into new technology and governance procedures can enhance public trust in new products, as well as helping businesses to meet their obligations through developing a practical understanding of the requirements of data protection legislation.

Q8: Do you consider that the current regulatory framework would be adequate to capture these risks?

As is currently the case with regulated financial services activities, it appears likely that firms will have to comply with both financial services regulations and data protection legislation within an open finance ecosystem.

The current UK data protection regime is relatively new, and will continue to evolve.. The ICO will continue its role in promoting, guiding and enforcing as we do with open banking and other novel schemes where personal data is being processed.

Q14: What functions and common standards are needed to support open finance? How should they be delivered?

In our work with open banking we have encountered challenges with overlaps in terminology which have needed careful management. For example, the term 'explicit consent' has differing meanings between the GDPR and PSD2, which has the potential to cause misunderstandings and has had to be thoroughly explained in published guidance for firms.

It would be useful to be able to work on terminology and concepts at an early stage to avoid further potential overlap between existing data protection terms and those proposed for use in open finance.

Q17: Do you agree that GDPR alone may not provide a sufficient framework for the development of open finance?

The GDPR specifically applies to the general processing of personal data rather than providing for any specific sector. Because of this we are keen to avoid any inadvertent 'gold plating' of existing rights and standards under the GDPR.

In relation to generic data processing, our Regulatory Action Policy outlines how the ICO upholds individuals' rights in the digital age. If a status quo is maintained and no further framework is introduced, we will continue to regulate as necessary using our current approach.

Should the GDPR prove not to be sufficient, any additional regulations or laws should be focussed on mechanisms of open finance.

We anticipate working with all parties to ensure alignment between data protection legislation and any new frameworks, and we are keen to help stakeholders work through any inconsistencies that may arise.

Q18: If so, what other rights and protections are needed? Is the open banking framework the right starting point?

Our work with the OBIE has been complementary to our regulatory aims, and on that basis we consider the open banking framework to be an appropriate starting foundation in relation to the personal data elements.

Q19: What are the specific ethical issues we need to consider as part of open finance?

The ICO is currently exploring the synergies and differences between data ethics and data protection, and has appointed an advisor on a 12-month basis to better explore the nature of the ICO's role in ethical issues.

As the nature of open ecosystems is ultimately to foster competition, balancing this with the rights and freedoms of individuals will need consideration. We also believe that thinking around vulnerability will form a core part of the thinking around open finance, and we look forward to being involved in discussions in these areas as they relate to the processing of personal data.

Q21: How should these set of principles be developed? Do you have views on the role the FCA should play?

As a regulator for the financial sector, the FCA will have a lead role to play in developing these principles. The ICO already works in close and collaborative fashion with the FCA and enjoys a positive relationship in relation to data processing in innovative products and services. We would expect this to continue as and when relevant activities take place.